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The AUSTRALIAN LAWYER

being the Thirteenth Volume of The
AUSTRALIAN CONVEYANCER & SOLICITORS JOURNAL

L. A. Harris

It is with a deep feeling of appreciation for services rendered to the journal and to the legal profession in general that the publishers announce the retirement of Mr. L. A. Harris, B.A., LL.B., from his post as Editor-in-Chief of this journal as from 31 December last.

Mr. Harris has been with the journal since its inception in 1948 and has given it the benefit of his diligent and constant labour, unremitting attention to detail, and concise and cogent reasoning. The present position of the journal, as having the largest circulation of any journal of its kind throughout Australia, is largely due to his efforts, which could only have been made at considerable personal sacrifice. Mr. Harris managed to combine his work for the journal, during the early part of the period he has been associated with it, with the onerous duties of his position as Senior Examiner of Titles at the N.S.W. Registrar-General's Department, an office from which he retired some years ago. Yet he has also found time to act as Editor of the Australian Encyclopaedia of Forms and Precedents in which capacity, we are happy to say, he will continue to act. However, in so far as his release from the duties of this journal will free him to devote more time than he could hitherto afford to well-deserved rest and relaxation, the publishers wish him the best of everything on his retirement.

A. Hiller

Mr. A. Hiller, who has been selected to fill the vacant office of General Editor of the *Australian Conveyancer and Solicitors Journal*, graduated as a Bachelor of Laws of Sydney University with First Class Honours and was awarded the University Medal. He has had previous experience with legal journals, having been a member of the Sydney Law Review Editorial Committee during 1958 and a Joint Student Editor-in-Chief of the Review as well as having been a contributor of several notes on recent cases of importance to the legal profession.

Mr. Hiller brings to his task a wealth of enthusiasm and a keen desire to provide up-to-date information of a practical nature to the readers of the Journal throughout the Commonwealth.

Australian Conveyancer and Solicitors Journal, January, 1960.

THE COMMONWEALTH MATRIMONIAL CAUSES ACT 1959

by

P. E. JOSKE, M.A., LL.M.
One of Her Majesty's Counsel

The *Matrimonial Causes Act* 1959 is to operate as from 1 July 1960. This Act repeals the Commonwealth Matrimonial Causes Acts of 1945 and 1955 but preserves the validity of judgments, decrees and orders made under those Acts and permits the continuance of proceedings pending under those Acts in Territories of the Commonwealth to which the new Act of 1959 does not apply, in other words, to Territories other than the Australian Capital Territory, the Northern Territory and Norfolk Island.

The new Act provides that a matrimonial cause may not be instituted as from 1 July 1960 except under, and in accordance with, the provisions of the Act. In doing this, however, it does not deprive courts of summary jurisdiction of any authority they may have to make and enforce separation orders or orders with respect to the maintenance of wives or children or the custody of, or access to, children. Nevertheless, in the event of a marriage being dissolved or annulled under the Act, this jurisdiction ceases in relation to the parties to the marriage or their children, save that arrears of maintenance due at the date of the divorce or nullity decree, may still be recovered under the summary jurisdiction order.

Matrimonial causes instituted before 1 July 1960 may only be continued as provided by the Act. Generally speaking, the law to be applied, and the practice and procedure to be followed, in relation to proceedings for dissolution or nullity of marriage or judicial separation which were pending at the above date, is the same as if the Act had not been passed. A petitioner or cross-petitioner may, however, be given leave to amend the petition or cross-petition to include a ground of relief provided by the Act and not already included in the petition. Where such a ground is already included in the petition, then those provisions of the Act specifically relating to such ground are to be applied in determining whether a decree is to be granted. In the event of a ground for relief being established which is also a ground for like relief under the Act, then the bars to relief to be applied shall be those applicable to such ground under the new Act, and no others. Thus if collusion is alleged, a petition will not be dismissed unless the case falls within the requirements for dismissal specified under the new Act. The

discretionary bars applicable in such a case are those set out in the new Act. A decree of nullity of marriage by reason of the parties being within the prohibited degrees of consanguinity or affinity will not be granted in any pending proceedings if the parties were not at the time of the marriage within one of such degrees as is prescribed in the Table set out in the Second Schedule to the Act. Pending proceedings are not affected by any provision restricting the bringing of proceedings within a certain period after marriage. The provisions of the new Act relating to a decree nisi for dissolution of marriage or nullity of a voidable marriage apply to pending proceedings in which a decree was not made before 1 July 1960. Pending proceedings constituting a matrimonial cause, other than proceedings for a decree of dissolution or nullity of marriage or of judicial separation, are to be continued under the Act. It is, however, provided that where a decree of restitution of conjugal rights was made before the Act in accordance with the law of New South Wales, proceedings for dissolution of marriage in respect of failure to obey the decree may still be taken in accordance with the law of New South Wales and without subject to any restrictions or qualifications imposed by the Commonwealth Act. Although proceedings have been instituted prior to the Act, ancillary relief in those proceedings can only be obtained in accordance with the Act.

Jurisdiction and domicil

Under the *Matrimonial Causes Act* 1959 the Supreme Court of each State is invested with federal jurisdiction and the Supreme Court of each Territory to which it applies has conferred jurisdiction to determine matrimonial causes instituted under the Act and also proceedings in matrimonial causes pending at the date the Act came into force, other than in relation to pending appeals and rights of appeal then existing.

Proceedings for dissolution of marriage or for the annulment of a voidable marriage may be instituted only by a person domiciled in Australia. This provision has the effect of creating an Australian domicil. It will no longer be necessary for a petitioner to establish domicil in a particular State or Territory. A court will not find it necessary to adjudicate between competing residences to decide where the domicil is. A person who has settled in Australia without obtaining a permanent home in any particular part and who may have had difficulty in establishing domicil in a State, will be able to prove his Australian domicil. Special provision has been made with regard to a wife's domicil. For the purposes of the Act, a deserted wife who was domiciled in Australia either

immediately before her marriage or immediately before the desertion and a wife who is resident in Australia at the date of instituting proceedings and has been so resident for the previous three years are deemed domiciled in Australia and may take proceedings under the Act that may be taken by a person so domiciled.

Proceedings under the Act for annulment of a void marriage, judicial separation, restitution of conjugal rights or jactitation of marriage can only be instituted by a person domiciled or resident in Australia. There is a special provision introduced in relation to proceedings in the Australian Capital Territory, the Northern Territory and Norfolk Island to the effect that jurisdiction is dependent on at least one of the parties being ordinarily resident in the Territory in question at the date proceedings are commenced there or having been resident in the Territory for not less than six months immediately before that date.

It will be seen that, as proceedings may be taken by persons domiciled or resident in Australia, they may be instituted in any part of Australia, irrespective of the place of living of the petitioner or the respondent. The only exception is that proceedings pending at the date of the Act coming into operation must be continued in the court in which they were instituted. Provision is made in the case of proceedings instituted under the Act, for the transfer of proceedings from one court to another, where it is in the interests of justice that this should be done; or where proceedings have been instituted in more than one court, power is given to grant a stay of one set of proceedings. Save as may be otherwise provided in the Act, in all suits other than for dissolution of marriage a court must act and give relief in accordance with the rules applied in the ecclesiastical courts prior to 1857. In all suits the recognized rules of private international law are to be applied where any question of conflict of laws arises.

Nullity of marriage—void marriages

A decree of nullity of marriage may be obtained where a marriage is either void or voidable. The Act prescribes what marriages are void and what marriages are voidable. A marriage is void where it is bigamous, or the parties are within the prohibited degrees of consanguinity or affinity, and in the latter instance a judge has not given permission to marry, or there has been a failure to comply with the requirements of the law of the place of celebration in relation to the solemnization of marriage; or there has been no real consent by one of the parties, either because the party's consent was obtained by duress or fraud, or there was a mistake by such party either as to the identity of the other party or as to the nature of the ceremony

performed, or that such party was mentally incapable of understanding the nature of the marriage contract, or that one of the parties was not of marriageable age. These provisions, which do not apply to marriages solemnized under or recognized by the *Marriage (Overseas) Act* 1955-1958, make substantial alterations in the law. Thus prior to the Act, marriages brought about by fraud or duress and marriages where a party was not of marriageable age have been held to be voidable only. In certain States marriages within the prohibited degrees were voidable only and the table of marriages within those degrees was much wider than that provided in the Act. After 1 July 1960 the only marriages within prohibited degrees are those set out in the Schedule to the Act. A marriage celebrated before that date is no longer voidable as being within the prohibited degrees unless the parties were, at the time of the marriage, within one of the prohibited degrees appearing in the said schedule. Where before the Act a marriage was void as being within the prohibited degrees, it remains void. Where before the Act it was voidable and has been declared void, it remains void. Where, however, it was voidable and had not been avoided before 1 July 1960, it is no longer capable of being avoided since that date unless the parties are within one of the degrees set out in the Schedule to the Act. In the event of persons within the prohibited degrees of affinity wishing to marry one another they may apply in writing to a Supreme Court judge for permission to do so, and the judge, if satisfied the circumstances are exceptional, may grant permission to marry.

—Voidable marriages

The Act provides that a marriage is voidable where either party is impotent, or is of unsound mind, or a mental defective, or is suffering from a venereal disease in a communicable form, or the wife is pregnant by a person other than the husband. A marriage is not voidable on any other ground. Mental defective means a person who suffers from arrested mental development requiring him to need control for his own protection or the protection of others and unfitting him for the responsibilities of marriage. A decree of nullity on the ground of impotence will not be made unless the court is satisfied that the incapacity to consummate the marriage still exists at the date of the hearing of the petition and that it is incurable, or that the respondent refuses to submit to a medical examination which the court considers necessary to determine whether the incapacity is curable, or that the respondent refuses to submit to treatment to cure the incapacity. The decree on the ground of impotence

will not be made at the suit of the party suffering from the defect unless such party was unaware of the defect at the time of marriage. Where a marriage is voidable on the ground of disability or disease, a decree will not be pronounced on the petition of the party affected by such disability or disease and where pregnancy of the wife renders the marriage voidable she may not petition for its avoidance, and no decree may be made on any of these grounds unless the petitioner was, at the time of marriage, ignorant of the facts constituting the ground, the petition was filed not later than twelve months after the date of marriage, and no marital intercourse with the petitioner's consent has taken place since the petitioner's discovery of the facts constituting the ground. A decree of nullity of a voidable marriage no longer avoids the marriage *ab initio* but only from the date of decree absolute. The effect of such decree is not to render illegitimate a child of the parties born since, or legitimated during, the marriage, nor does it make valid another marriage contracted during the existence of the voidable marriage. The new provision will also affect decisions relating to property rights based on the view that the effect of a decree of nullity of a voidable marriage was that there never had been a marriage.

Dissolution of marriage

The new Act contains fourteen grounds for dissolution of marriage. It gets rid of archaic provisions relating to the necessity for a wife to prove more than a single act of adultery. A single act of adultery is now a sufficient ground for divorce.

Desertion for two years is made a ground for divorce. In addition the Act makes important amendments of the law in relation to desertion. Courts have been vexed for many years with the problem of intention in relation to desertion and the decisions which have been given are neither easy to apply nor satisfactory in their results. Accordingly, the Act provides that a married person whose conduct constitutes just cause or excuse for the other party to the marriage to live separately or apart, and occasions that other party to live separately or apart, shall be deemed to have wilfully deserted that other party without just cause or excuse, notwithstanding that that person may not in fact have intended the conduct to occasion that other party to live separately or apart.

At one time separations were regarded as completely contrary to public policy and the common law has not entirely departed from this view. The Act adopts a view more in line with the original common law. Following on

the view laid down in the cases that desertion can be terminated and the deserted party turned into a deserter by a bona fide offer to resume cohabitation being made and unjustifiably refused, it seeks the termination of separation although the separation has been brought about or continued by agreement. It is provided that where husband and wife are parties to an agreement for separation, whether oral, in writing or constituted by conduct, the refusal by one of them, without reasonable justification in all the circumstances including the other's conduct, to comply with the other's bona fide request to resume cohabitation constitutes, as from the date of the refusal, wilful desertion without just cause or excuse on the part of the party so refusing.

The Act also provides that a period of desertion is not terminated by the deserter becoming insane before the statutory period expires. The general effect of the amendments made in relation to desertion is, in the picturesque language of the late Sir Harrison Moore, "to jettison a cargo of useless lumber in the shape of decided cases".

Wilful and persistent refusal to consummate a marriage, previously a ground of matrimonial relief in Western Australia only, is made a ground for divorce and is not subject to the restriction against taking divorce proceedings within the first three years of marriage. The court may not grant a divorce on this ground unless satisfied that the marriage has not been consummated. Refusal to consummate is very often due to some psychological difficulty and it is likely that future petitions for nullity on the ground of impotence will contain an alternative claim for divorce on this ground.

The South Australian ground of habitual cruelty for one year has been accepted and the ground of repeated assaults and cruel beatings existing in New South Wales, Victoria and Tasmania has been rejected and will cease to be a ground for dissolution of marriage. The accepted ground is both wider and narrower than the rejected ground. It is wider in that it includes both mental and physical cruelty. It is narrower in that the conduct relied on must be "habitual" and it is insufficient merely to prove that it has been "repeated".

Rape, sodomy and bestiality remain grounds for divorce but are now available throughout Australia on the petition of both husband and wife. Evidence of conviction for the crimes in question is admissible on the hearing of such a petition and a duly certified copy of the conviction is conclusive evidence thereof.

Habitual drunkenness for two years is a new ground for divorce. Previously divorce was obtainable in some States in respect of habitual drunkenness for a longer period when coupled with other habitual wrongful conduct. Habitual intoxication by the use of drugs is included in the ground of habitual drunkenness. A person who is habitually drunk for part of the statutory period and habitually intoxicated by drugs during the other part is guilty of conduct coming within the ground.

The grounds of (a) frequent convictions for crime and failure to support, (b) imprisonment for three years for offence punishable by death or imprisonment, and (c) conviction for attempted murder or unlawful killing of, or for intentionally inflicting grievous bodily harm on the petitioner, are all similar to grounds previously existing in the States other than Queensland. The ground of habitual and wilful failure for two years to pay maintenance under an order or separation agreement may fill a gap in the law relating to desertion, though practitioners will probably agree that courts regard proof of failure to pay maintenance as the best evidence of desertion. A decree is not to be made on this ground unless the petitioner has made reasonable attempts to enforce the order or agreement.

Where a decree of restitution of conjugal rights has been obtained and is disobeyed, divorce is obtainable on proof of failure for one year to obey the decree. This means that two sets of proceedings, one for the restitution order and one for the divorce decree, must be undertaken and, of course, two sets of costs incurred. As there will be delay caused by taking the restitution proceedings and a year's further delay after the breach of the restitution order, there will not be much point in relying on this ground rather than on the ground of two years' desertion and it will be certainly far more expensive to take advantage of it. It may be, as a result of the provisions of the new Act, that suits for restitution of conjugal rights will, in the main, now be brought for the genuine purpose of bringing about a resumption of cohabitation.

The ground of incurable insanity is that already accepted in the four States of Queensland, Victoria, South Australia and Western Australia. There is an additional provision, introduced apparently out of abundant caution, that the court must be satisfied that the respondent was still confined in an institution, and unlikely to recover, at the commencement of the hearing of the petition.

It is a ground of divorce that the parties to the marriage have separated (whether by agreement, decree or otherwise) and thereafter have lived separately and

apart for a continuous period of not less than five years immediately preceding the date of the petition and there is no reasonable likelihood of cohabitation being resumed. Neither condonation nor connivance is a bar to a divorce on this ground, and the discretionary bars set out in the Act also do not apply. Certain special provisions have, however, been enacted with regard to it. Where the petitioner's conduct has been such as would make it harsh and oppressive to the respondent, or contrary to public interest to grant a decree on this ground, it must be refused. There is also a discretionary bar where the petitioner has committed adultery which is either uncondoned, or if condoned has been revived. Where there are cross-petitions, a decree may not be made on the ground of separation if another ground is proved on the other petition, and a decree may be made thereon.

Presumption of death has also been made a ground for divorce and it is provided that where there is proof that the other party to the marriage was actually absent from the petitioner for a period of seven years immediately preceding the date of the petition, and that the petitioner had no reason to believe that the other party was alive at any time within that period, that is sufficient to establish the ground, unless it is shown that the other party to the marriage was alive within that period.

[*To be concluded.*]

THE OXFORD LAWYER

We have received the Trinity issue for 1959 of "The Oxford Lawyer", a comparatively new English legal journal published biannually at Christ Church, Oxford. It contains a number of articles, mainly on current matters of general interest associated with the law, which are examined in the light of the relevant legal principles applicable to them, e.g., on the Iceland Fisheries Dispute. It also contains some notes on his "Reflections in Retirement" by the Rt. Hon. Lord Birkett, P.C., and a Book Review section. Subscriptions (post paid), 7s. per annum in the United Kingdom; 10s. or $1.50 abroad.

SHIPPING

Introduction to Shipping Law by Ronald Bartle, B.A. (Cantab.), of Lincolns Inn, Barrister-at-Law, Lecturer in Shipping Law at the City of London College.

Published by Sweet & Maxwell (1959). A comprehensive survey of the law of shipping.

SOUTH AFRICAN LAW

Acta Juridica. This is the new name of Butterworths South African Law Review which is now being published by the Faculty of Law, University of Cape Town, and will continue as an annual publication. A special number of the Journal was issued in 1959 to mark the centenary of the foundation of the Faculty of Law at Cape Town University.

DISTINCTION BETWEEN LEASE AND LICENCE

by

A. HILLER, LL.B.

The distinction between leases and licences is a matter of considerable practical importance in present times, notably in view of the considerable protection extended to and rights conferred on tenants by the provisions of the *Landlord and Tenant (Amendment) Act* 1948-1958 (N.S.W.).[1] Accordingly, the recent decision of the High Court in *Radaich* v. *Smith* [1A] delivered on September 7 1959, laying down the law on this point, and examining the history thereof, merits the attention of all members of the legal profession.

The position before 1952

Up to 1952 the test applied by the courts in distinguishing between a lease and a licence was to see whether the occupier had been given the right to exclusive possession of the property or not. In the former case he was regarded as a tenant with an interest in the land but in the latter only as a licensee with a purely contractual right which unless coupled with an interest (either in land or in chattels) is revocable at law,[2] gives no rights against third parties and "operates as a bare permission to do what would otherwise be an invasion of the licensor's rights".[3] The attitude of the courts as to the test to be applied is indicated by the classic words of LORD DAVEY in *Glenwood Timber Co.* v. *Phillips*[4] where His Lordship, delivering the judgment of the Privy Council, said:—"If the effect of the instrument is to give the holder an exclusive right of occupation of the land though subject to certain reservations or to a restriction of the purposes for which it may be used, it is in law a demise of the land itself."[5]

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[1] Though see s. 6A which applies to licences to occupy certain premises for purposes of residence.

[1A] [1959] A.L.R. 1253; (1959), 33 A.L.J.R. 214.

[2] In some circumstances a personal licence to go upon land will be enforced by a court of equity either by specific performance or by injunction. This rule however does not apply to the case of licences which are part and parcel of an agreement which a court of equity would not enforce either directly or indirectly such as contracts involving a substantial element of personal service. See *Heidke* v. *Sydney City Council* (1952), 52 S.R. (N.S.W.) 143.

[3] Per Dixon, J. (as he then was), *Cowell* v. *Rosehill Racecourse Co., Ltd.* (1937), 56 C.L.R. 605, at p. 630.

[4] [1904] A.C. 405.

[5] *Supra* at p. 408.

The courts had also made it clear that in determining whether a particular agreement was a licence or a lease they would look at the intention of the parties as appearing from the arrangement made between them and would not be bound by any technical words with which the parties might choose to describe their agreement.[6] As SUGERMAN, J. declared in *Birt & Co. Pty. Ltd.* v. *Leichhardt Municipal Council*:—

"The distinction between a lease and a licence is one of substance, not dependent necessarily upon the words used by the parties in creating their relationship. . . . Since the matter is one of substance, the result cannot be altered by attaching a label to the transaction which is incorrect. If in substance it is a licence, it does not become a lease because the parties call it a lease. If in substance it is a lease it does not become a licence merely because the parties say 'This is a licence and not a lease'."[7]

Accordingly, in that case His Honour held that a deed described as a licence under which the appellants occupied land vested in the Maritime Services Board constituted a lease as the deed exhibited a clear intention to confer upon the appellants the exclusive possession of the subject property even though the deed provided that nothing therein contained shall amount to or be construed as a demise or as an agreement to demise the premises.

Errington's Case[8] and subsequent cases

In *Errington* v. *Errington*,[9] DENNING, L.J. (whose judgment was approved by SOMERVELL, L.J., and impliedly by HODSON, L.J.) stated that the test of the right to exclusive possession was by no means decisive and may

[6] See *Booker* v. *Palmer*, [1942] 2 All E.R. 674, concerning bombed-out evacuees during the Second World War who had been allowed by the landowner to occupy a vacant cottage of his rent-free for the duration of the war. The Court of Appeal held that the occupiers were mere licensees and the landowner's successor in title was entitled to revoke the licence at any time and obtain possession of the cottage. Lord Greene, M.R., said (at p. 676): "Whether or not parties intend to create as between themselves the relationship of landlord and tenant, under which an estate is created in the tenant and certain mutual obligations arise by implication of law, must in the last resort be a question of intention", whilst at p. 677 His Lordship said:—

"To suggest there is an intention there to create a relationship of landlord and tenant appears to me to be quite impossible. There is one golden rule which is of very general application, namely that the law does not impute intention to enter into legal relationships where the circumstances and the conduct of the parties negative any intention of the kind. It seems to me that this is a clear example of the application of that rule."

[7] (1951), 18 L.G.R. (N.S.W.) 78, at p. 82.

[8] *Errington* v. *Errington*, [1952] 1 All E.R. 149.

[9] [1952] 1 All E.R. 149.

not correspond with realities. His Lordship referred to the judgment of LORD ABINGER in *Howard* v. *Shaw*,[10] where His Lordship expressed the view (*obiter*) that a person let into exclusive possession under a valid contract for the sale of the property to him could not be considered a tenant.[11] DENNING, L.J., held that the true criterion for distinguishing between leases and licences was to see whether the occupier had been granted an interest in the land or merely a personal privilege. Although a person let into exclusive possession was prima facie to be considered a tenant this was not necessarily so; if it appeared from the circumstances and the conduct of the parties that it was only intended to grant a personal privilege with no interest in the land he would be held to be a licensee only.[12] It may be noted that DENNING, L.J., accepted the view taken in the earlier cases that the distinction between a lease and a licence was one of substance and not of words. Thus in *Errington* v. *Errington*[13] he said:—"Words alone may not suffice. Parties cannot turn a tenancy into a licence merely by calling it one."[14]

DENNING, L.J.'s view[15] was followed in England in *Cobb* v. *Lane*[16] by the Court of Appeal and in New South Wales by ROPER, C.J., in Equity in *Re May and Conveyancing Act*[17] and by SUGERMAN, J. in *Wynyard Investments Pty. Ltd.* v. *Metropolitan Water Sewerage and Drainage Board*[18] in which last-mentioned case His Honour said:—"The two recent decisions (*Errington's Case*[19] and *Cobb* v. *Lane*[20]) make it plain that exclusiveness of possession

[10] (1841), 8 M. & W. 118.
[11] In the same case Alderson, B. and Parke, B. said that a person let into exclusive possession under a contract for purchase of the property by him was a tenant at will.
[12] In the past, if the right to exclusive possession had been conferred on the occupier, this was considered also to involve the grant of an interest in the land.
[13] [1952] 1 All E.R. 149.
[14] [1952] 1 All E.R. 149 at p. 155. But see *Wynyard Investments Pty. Ltd.* v. *Metropolitan Water Sewerage and Drainage Board* (1953), 19 L.G.R. (N.S.W.) 26 at p. 29, per Sugerman, J.: "I draw attention to His Lordship's [i.e., Lord Denning in the above-cited passage] use of the words 'alone' and 'merely'. There may conceivably be cases in which the character of the intended relationship being in doubt, the words used by the parties to describe it may be thrown into the balance."
[15] It may be noted that before the decision in *Errington* v. *Errington* (*supra*) Evershed, M.R., had stated in *Marcroft Wagons Ltd.* v. *Smith*, [1951] 2 All E.R. 271 at p. 274, that a person may have such a right of exclusive possession of property as to enable him to bring an action of trespass against the owner, yet such person had no interest in the land.
[16] [1952] 1 All E.R. 1199.
[17] (1952), 69 W.N. (N.S.W.) 120.
[18] (1953), 19 L.G.R. (N.S.W.) 26.
[19] [1952] 1 All E.R. 149.
[20] [1952] 1 All E.R. 1199.

is no longer to be regarded as a crucial or final test, that is to say a test negativing the possibility of the occupier's being a licensee".[21] However, in 1956, in *Wheeler* v. *Mercer*,[22] VISCOUNT SIMONDS refused to accept the stand taken by LORD ABINGER in *Howard* v. *Shaw*[23] on which DENNING, L.J., had relied in *Errington's Case*[24] and instead expressed the same opinion as PARKE, B. and ALDERSON, B. had expressed in *Howard* v. *Shaw*[25] namely, that a person let into exclusive possession under a contract for purchase must be regarded as a tenant at will. Furthermore, next year, in *Addiscombe Garden Estates Ltd.* v. *Crabbe*,[26] JENKINS, L.J. (with whose judgment the other two Lord Justices concurred) reaffirmed the old test and held that the fact of exclusive possession was still, at any rate, "a consideration of the first importance"[27] in deciding that there was a lease and not a mere licence. His Lordship said that *Errington's Case*[28] dealt with most unusual circumstances[29] and DENNING, L.J.'s principle should be limited to exceptional cases of the kind mentioned by DENNING, L.J., in the case of *Facchini* v. *Bryson*,[30] viz., where there were family arrangements, acts of friendship or generosity, or the like, to negative any intention to create a tenancy. The decision in *Addiscombe Garden Estates Ltd.* v. *Crabbe*,[31] however, still left the legal position in New South Wales and elsewhere in Australia in a state of doubt as *Errington's Case*[32] had already been followed here by a number of our local judges.

The decision of the High Court

On September 7 1959 the issues discussed in this article came before the High Court of Australia on appeal from a decision of BRERETON, J. of the Supreme Court of

[21] (1953), 19 L.G.R. (N.S.W.) 26 at p. 29.
[22] [1957] A.C. 416 at p. 425.
[23] (1841), 8 M. & W. 118.
[24] [1952] 1 All E.R. 149.
[25] (1841), 8 M. & W. 118.
[26] [1958] 1 Q.B. 513; [1957] 3 All E.R. 563.
[27] *Supra* at p. 528.
[28] [1952] 1 All E.R. 149.
[29] In *Errington* v. *Errington* (*supra*) the occupant was the daughter-in-law of the deceased landowner whose widow, to whom the house had been left by the deceased's will, was suing for possession. The deceased had paid part of the purchase price for the property, obtained a loan for the balance by way of mortgage repayable by instalments with interest, and told the daughter-in-law that so long as she and her husband kept paying the instalments they could occupy the house and when the mortgage was finally paid off the property would become theirs. It was held *inter alia* that the couple, though they had exclusive possession of the house, were not tenants at will, but contractual licensees.
[30] (1952), 1 T.L.R. 1386 at p. 1389.
[31] [1958] 1 Q.B. 513; [1957] 3 All E.R. 563.
[32] [1952] 1 All E.R. 149.

New South Wales in the case of *Radaich* v. *Smith*.[33] Their Honours unanimously reaffirmed the old "exclusive possession" test and adopted (and in some ways extended) the principles laid down by JENKINS, L.J., in *Addiscombe Garden Estates Ltd.* v. *Crabbe*.[34]

The present case dealt with a deed by which the respondent "as licensor" granted to the appellant "as licensee" for a term of five years from the date thereof "the sole and exclusive licence and privilege to supply refreshments to the public admitted to", the subject premises described as a "lock-up shop" and to carry on the business of a milk bar therein. Their Honours held that the agreement was a lease and not a licence and accordingly the premises were subject to the determinations of the Fair Rents Court under the *Landlord and Tenant (Amendment) Act* 1948-1954 (N.S.W.). The character of the business to be carried on was such that it could only be effectively conducted if the occupier had the right of exclusive possession of the premises for the specified term and there was no indication in the deed that the parties did not recognize this as an implication of their agreement. The members of the court also took into consideration that the deed though describing the parties as licensor and licensee yet in form and contents resembled an ordinary lease. The former factor was held to be of no consequence as the question whether a licence or a lease had been granted had to be determined on consideration of the substance and effect of the deed itself. Furthermore, it was also pointed out as a factor indicating an intention to confer exclusive possession on the appellant that "the means of closing and opening the premises" were to be at the appellant's disposition under the agreement.

Although Their Honours all came to the same decision in the present case, the extent to which they were prepared to go in upholding the old test as against that propounded by DENNING, L.J., differed amongst them. Thus MCTIERNAN, J., after stating that the true test was whether exclusive possession had been conferred upon the alleged lessee, adopted the judgment of JENKINS, L.J., in *Addiscombe Garden Estates Ltd.* v. *Crabbe*,[35] thus apparently accepting the latter's view that DENNING, L.J.'s statement of principle in *Errington's Case*[36] was at any rate applicable to cases of the kind mentioned by him in *Facchini* v. *Bryson*.[37]

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[33] (1959), 33 A.L.J.R. 214.
[34] [1958] 1 Q.B. 513.
[35] *Supra*.
[36] [1952] 1 All E.R. 149.
[37] (1952), 1 T.L.R. 1386.

TAYLOR, J. on the other hand, while admitting that there may be exceptional cases where the right of exclusive possession has been conferred without the grant of a leasehold interest, expressed the opinion that the fact of a transaction being induced by ties of kinship, friendship or generosity would not operate to bring it within this exceptional category. Finally, WINDEYER, J. declared that once the right of exclusive possession in land had been granted the grantee occupier must, and could, not be other than a tenant and asserted that this proposition admitted no exceptions. His Honour said that a number of recent cases arising mainly from Rent Restriction and other like statutes in which occupants were held to be licensees and not tenants could be explained by distinguishing between sole occupation in fact (which they did enjoy) and the right of exclusive possession in law (which they did not).

WINDEYER, J. also pointed out that it was long-established law that a limited right of entry reserved to the landlord, e.g., for purposes of repair or to view the premises, is not inconsistent with the legal right of exclusive possession. Subject to these reservations the tenant could exclude the landlord as well as strangers from the premises leased to him. On the other hand, if the landowner could enter at any time, admit any persons he wished, give them keys and licence them to use the premises in the grantee's absence for any purpose he chose other than the business carried on by the grantee thereon then it was clear that the parties did not intend to create a tenancy but only a mere licence.

Conclusion

In conclusion the decision of the High Court is to be welcomed as helping to clear up many of the uncertainties lurking in this important branch of the law. However, it should be noted that the position is still by no means completely cleared up, and it has been left a matter for the discretion of the courts in future cases to decide whether a particular case falls within the exceptional category accepted by MCTIERNAN, J. and TAYLOR, J., whatever that category may consist of, or whether a person has been allowed to enjoy sole occupation in fact as distinct from the right to exclusive possession in law, to adopt WINDEYER, J.'s views. Finally, what the right of exclusive possession consists of is still very much a question of fact to be determined by looking at the facts of each case, and leaving much to the discretion of the trial judge, though the judgments of the members of the High Court do provide valuable indications of the factors to be considered in determining the presence or non-existence in the occupier of the right to exclusive possession.

LANDLORD AND TENANT

Lease—option of purchase—conditions precedent—waiver —estoppel—compliance with conditions.—A lease of land under the *Real Property Act* 1900-1956 for a term of five years contained a clause by which the tenant had an option of renewal of the lease for a further term of five years subject to the giving of three months notice in writing, the punctual payment of rent and due performance of the lessee's covenants. During the term of the lease rent had frequently not been paid punctually but the lessor had not raised any objection thereto. Notice was given by the tenant of his intention to exercise the option and negotiations regarding renewal had taken place but no renewal had been granted. The tenant sought specific performance of the agreement to give the renewal and claimed that performance of the condition as to punctual payment of rent had been waived and that the lessor was estopped from relying upon the breach of the terms of the option. It was held that performance of the term as to payment of rent was a condition precedent to the right of the tenant to exercise the option. The nature of an option to renew the lease and of waiver considered (*Gilbert J. McCaul (Aust.) Pty. Ltd.* v. *Pitt Club*, [1959] S.R. (N.S.W.) 122).

BOOK REVIEW

CRIMINAL LAW by J. P. Bourke, M.A., LL.B., Q.C., D. S. Sonenberg and D. T. M. Blomme, LL.B., *Barristers-at-Law* (BUTTERWORTH & CO. (AUST.) LTD., 1959)

This work, though bearing the general title "Criminal Law" is in fact the fourth publication in Butterworths series of Annotated Acts of Victoria. In substance it consists of the Victorian *Crimes Act* 1958 and the Commonwealth *Crimes Act* 1914-1955 together with annotation on the respective texts. There are cross references and references to corresponding sections in the Victorian Acts of 1928 and 1957 as well as to the original Imperial legislation. The annotation consists of succinct statements of principle in keeping with what is essentially a practitioner's work. Nevertheless, a very considerable body of authority has been collected and cited in footnotes. The arrangement of authority has been usefully devised in such a manner as to separate "Australian Cases" from other cases, though one might perhaps wonder why non-Australian cases are described throughout the book indifferently as "Other Cases" or "English Cases" when the authors have been at pains, at p. 30, to define "English Cases" as including all cases other than Australian Cases.

Also published are comparative tables of the corresponding sections of the 1928 and 1957 Victorian Crimes Acts, a table of cases, and tables of offences and indices in respect of each Act. An Appendix of recent additions and alterations corrects the references to other Victorian legislation throughout the book to the corresponding enactments of the 1958 Consolidation.

The book is a very useful and practical guide to the prevailing Victorian Criminal Law. It is a book for immediate reference to the case Law applicable to the two Statutes it contains and as such it should commend itself to Victorian practitioners.

(H. W. Fox)

W. E. Smith Limited, Webb and Boundary Streets, Croydon, N.S.W.